

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBBY DEAN FAIRINGTON,

Defendant and Appellant.

F067309

(Super. Ct. No. BF141953A)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kern County. Michael G. Bush, Judge.

Eleanor M. Kraft, under appointment by the Court of Appeal, for Defendant and Appellant.

Office of the State Attorney General, Sacramento, California, for Plaintiff and Respondent.

-ooOoo-

* Before Cornell, Acting P.J., Kane, J., and Detjen, J.

The court placed appellant, Robby Dean Fairington, on probation after he pled no contest to vehicle theft (count 1/Veh. Code, § 10851, subd. (a)), receiving stolen property (count 2/Pen. Code, § 496d, subd. (a)), and driving while his driving privilege was suspended (count 3/Veh. Code, § 14601.2, subd. (a)) and he admitted a prior prison term enhancement (Pen. Code, § 667.5, subd. (b)) and allegations that he had a prior conviction within the meaning of the three strikes law (Pen. Code, § 667, subds. (b)-(i)).

On May 13, 2013, Fairington admitted that he violated his probation and was sentenced to a four-year prison term. Following independent review of the record pursuant to *People v. Wende* (1979) 25 Cal.3d 436, we affirm.

FACTUAL PROCEDURAL HISTORY

On May 7, 2012, a police officer saw Fairington driving a vehicle that had been stolen two days earlier. Fairington parked the vehicle outside a mall and was subsequently arrested inside.

On May 9, 2012, the district attorney filed a complaint charging Fairington with the three counts and allegations he subsequently pled to.

On June 6, 2012, Fairington entered his plea in this matter in exchange for an indication by the court that it would strike the prior strike conviction and a stipulated sentence of one year in local custody and one year on supervised release. Fairington was also going to be released at sentencing to a year-long residential drug treatment program to which he had been accepted. In an unrelated case (case No. BM796315A) Fairington pled no contest to misdemeanor second degree burglary (Pen. Code, § 460, subd. (b)).

On July 9, 2012, the court struck Fairington's prior strike conviction. It then suspended imposition of sentence and placed Fairington on probation for three years on condition that he serve 120 days in local custody after which he would be released to a residential drug treatment program. Fairington agreed to waive custody credit while in the program.

On November 29, 2012, the probation department filed a declaration alleging that Fairington violated his probation by not enrolling in a residential drug/alcohol treatment program and by committing a new law violation.

On December 13, 2012, Fairington admitted the allegation that he violated his probation.

On January 16, 2013, the court sentenced Fairington to an aggregate four-year prison term, the aggravated term of three years on his vehicle theft conviction and a one year prior prison term enhancement. After suspending execution of sentence, the court reinstated Fairington's probation and ordered him to serve a year in custody, although after serving 120 days he could be released to a one-year residential drug treatment program.

On February 14, 2013, the probation department filed a notice of probation violation alleging Fairington violated his probation by committing a new law violation and failing to report his arrest of January 30, 2013, to the probation officer.

On May 13, 2013, after Fairington admitted violating his probation, the court sentenced him to the four-year prison term it had previously suspended. The court also awarded Fairington 513 days of presentence custody credit consisting of 257 days of presentence actual custody credit and 256 days of presentence conduct credit.

Fairington's appellate counsel has filed a brief which summarizes the facts, with citations to the record, raises no issues, and asks this court to independently review the record. (*People v. Wende* (1979) 25 Cal.3d 436.) However, in a letter filed on September 18, 2013, Fairington appears to contend that he should have been sentenced to local time because the court struck his prior strike conviction. Not so.

"The Realignment Act significantly changes felony punishment. Under prior law, felonies were offenses punished by death or imprisonment in state prison. [Citation.] The Realignment Act changes the definition of a felony to an offense punishable by

death, imprisonment in state prison, or by ‘imprisonment in a county jail under the provisions of subdivision (h) of [Penal Code] [s]ection 1170.’ [Citation.]” (*People v. Lynch* (2012) 209 Cal.App.4th 353, 357.) Defendants sentenced under the Realignment Act are generally committed to county jail instead of state prison. (*People v. Griffis* (2013) 212 Cal.App.4th 956, 961.) “However, *prison sentences are imposed if the defendant has current or prior serious or violent felony convictions*, is required to register as a sex offender, or has sustained a [Penal Code] section 186.11 aggravated white-collar crime enhancement.” (*People v. Sheehy* (2014) 225 Cal.App.4th 445, 450, italics added.)

The trial court had discretion under the Realignment Act to grant Fairington probation. (Pen. Code, § 1170, subd. (h)(4).) Further, striking the prior strike conviction allowed the court to place Fairington on probation. (*People v. Superior Court (Roam)* (1999) 69 Cal.App.4th 1220, 1229.)

However, “‘when a court has struck a prior conviction allegation it has not “wipe[d] out” that conviction as though the defendant had never suffered it; rather, the conviction remains a part of the defendant’s personal history’ and available for other sentencing purposes. [Citations.]” (*People v. Lara* (2012) 54 Cal.4th 896, 906.) Thus, a trial court’s power to dismiss prior convictions pursuant to Penal Code section 1385 does not extend to preventing a prior conviction from being used as a sentencing factor. (*In re Varnell* (2003) 30 Cal.4th 1132, 1137.) A defendant’s prior strike conviction is a sentencing factor when used to determine his eligibility for Realignment Act sentencing. (*People v. Griffis, supra*, 212 Cal.App.4th 956, 959.) Consequently, once the court revoked Fairington’s probation and did not reinstate it, Fairington’s prior strike conviction required the court to sentence him to prison.

Further, following an independent review of the record we find that no reasonably arguable factual or legal issues exist.

DISPOSITION

The judgment is affirmed.